1969

State Of Utah, By And Through Its Road Commission v. Thomas P. Williams And Jo Ann H. Williams, His Wife : Petition For Rehearing

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff and Respondent,

vs.

THOMAS V. WILLIAMS and JO ANN H. WILLIAMS, his wife,
Defendants and Appellants,

Case No. 11388

PETITION FOR REHEARING

Appeal from Judgment and Order
Second District Court, Davis County
Honorable Parley E. Norseth, Presiding

GLEN E. FULLER
Attorney for Defendants-Appellants
15 East 4th South
Salt Lake City, Utah

GARY A. FRANK
Assistant Attorney General
Salt Lake City, Utah
Attorney for Plaintiff and Respondent

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PREFACE

Appellants seek a re-hearing and a reconsideration of the opinion handed down in this matter by this Court on April 4, 1969. It is submitted that the opinion contains several errors of law, that it adds to considerable confusion which already exists in the field of eminent domain law in the State of Utah, and that the rule announced in the decision is unworkable in practice.

It is further submitted that the opinion places Utah law in a very narrow minority of jurisdictions restricting recovery for severance damages, and, specifically, the ruling places Utah practically alone among the jurisdictions denying consideration to the element of noise in its effect upon the value of real property — both in "severance" and "consequential" damage situations.

Although the writer of this Petition is fully aware that the Court rarely re-considers these matters, it is still felt that he would be totally remiss in his duty in not seeking a re-hearing since the Court's opinion did not squarely decide the issue presented to it, it improperly ruled out consideration of noise in all eminent domain cases—*even though the plaintiff did not contend that noise was never recoverable,* and the legal and factual difficulties created by the decision will further haunt the orderly trial of eminent domain cases in the future.

ARGUMENT

POINT I

THE DISTINCTION BETWEEN SEVERANCE AND CONSEQUENTIAL DAMAGES SET FORTH IN THE OPINION IS BOTH LEGALLY INCORRECT AND CONFUSING.

Basic to any understanding and computation of damages in a condemnation case is the proper categori-

zation of the two principal types of damages to properties not taken in a condemnation suit. As pointed out in the opinion in this matter, Section 78-34-10, U.C.A. 1953, contains two specific sub-sections covering damages to remaining properties. It is submitted by appellants—and was so contended in their Brief in this matter—that the two sub-sections clearly delineate the difference between "severance" and "consequential" damages. Any different definition to these two types of damages will inevitably create nothing but mounting confusion in the field of eminent domain law.

The crux of the distinction in the Court's opinion is contained in the following sentence:

> "All damages not caused by the taking or the severing of the land or the manner of the construction of the improvement are consequential and not within the protection of the constitutional provision unless they are such as would be actionable at common law or would affect the land physically."

It is submitted that the foregoing definition of "consequential" damages is incorrect and vague, unsupported by any decision or authority. This writer again reiterates and contends that if the damages result from situations involving an underlying *taking of property*, then the resulting damages must be termed "severance"; otherwise, if there is not an underlying taking of property, then the resulting damages are "consequential". This distinction is made mandatory by the two subsections of our statute. As Nichols points out (Sec.

6.4432), broadly speaking, " . . . *all damages must of necessity be consequential since all damage is the consequence of an injurious act.*" But that work goes on to point out the difference between *taking* and *no taking* cases. In 4 Nichols on Eminent Domain, Sec. 14-1 at page 473 it is stated:

> "A distinction must be drawn between consequestion damages to a remainder area where part of a tract is physically appropriated and consequestial damages to a tract no part of which is physically appropriated. In the latter case the damage must be peculiar to such land and not such as is suffered in common with the general public."

In defining the word "consequential" damages 2 Nichols on Eminent Domain, Section 6.4432 states the meaning to be—

> "The term is generally used with reference to damage to property no part of which is appropriated."

In its opinion in this matter this Court has taken the definition of "consequential" damages and superimposed it over into the area of "severance" damages. Even if the ultimate decision of this Court was intended to be that noise cannot be considered in any eminent domain case, it is still clearly erroneous to create confusion in the field of eminent domain law by classifying noise as a "consequential" damage in a case where there exists an underlying actual taking of property within the scope of sub-section (2) of Section 78-34-10, U.C.A.

1953. Rather, as this writer has contended before this Court on two different occasions, in a taking case the proper classification of "severance" damages should remain, but the ruling should be that the particular type of damage is simply *non-compensable.*

Believing that issues of this type can often be better presented in a pictorial or diagram form, there is inserted on the flyleaf of this brief a sheet showing the different types of "severance" and "consequential" damages and various Utah decisions supporting the compensable types of damages under each category. The Utah decisions can generally be properly classified, although some need to be "stretched" a bit to fit. A few cases, not included in the outline are, in the writer's opinion, clearly wrong. It can be seen that the writer has clearly delineated "severance" from "consequential" damages, and within each classification there are—as this writer is contending in this Petition—definite compensable and non-compensable items. It is submitted that the accompanying chart, which has been prepared by this writer as a general condensation of many years of careful study and devotion of the major portion of his practice to eminent domain matters, is the first realistic attempt in this state to properly categorize some of the pertinent cases and the type of damages involved in different situations which have arisen.

If there has been a partial taking the entire proceeding as to damages to remaining properties is governed by sub-section (2) of Section 78-34-10, as —

"severance" damages. On the other hand, if there is no underlying taking, then the proceedings and the type of damages are recoverable under sub-section (3) of the same statutory section—*"consequential"* damages. In short, *the two types of damages are mutually exclusive and can never be found together in any litigation involving the same remaining piece of property!*

To illustrate the distinction between "severance" and "consequential" damages, we can utilize two previously decided cases of this court. In the case of ***Springville Banking Company v. Burton*** (1960), 10 U. 2d 100, 349 P. 2d 157, and the case of ***Fairclough vs. Salt Lake County*** (1960), 10 U. 2d 417, 354 P. 2d 105, we actually had two cases involving "consequential" damages for the simple reason that there was no basic underlying taking such as would bring the State Road Commission into Court. However, if in both cases there had in fact been an actual taking of a portion of the property owner's lands, thereby classifying the damages in both instances as "severance" damages, we would have a situation producing different results. In the *Springville Banking* case, since the nature of the damages was caused by the creation of traffic islands or dividers in the street, such damage had there actually been a taking, would have been *non-compensable*—and that portion of the evidence would not go to the jury at all. This would be so because the action taken was a function of the police power in regulating the flow of traffic.

On the other hand, if we assume that there had been an actual taking of a portion of the properties in the *Fairclough* case, the matter would have been entirely different since the taking and the construction of the project was tied to a substantial change of highway grade affecting the property's right of access. The nature of the damage under such facts would also be "severance" but the evidence of loss of value to the remaining properties would be clearly admissible and recoverable under our Utah cases and those of practically every other jurisdiction known to the writer, since this type of damage is *compensable.*

Until our Utah decisions clearly and properly delineate the distinctions between "severance" and "consequential" damages, and the correlative concepts of "compensable" and "non-compensable" damages, the confusion among our cases will grow greater and greater. Until this decision and the recent case of *State of Utah by and through its Road Commission v. Stanger* (No. 11028), ... Utah 2d ...., 442 P. 2d 941, it was possible to properly categorize the different Utah decisions as being "severance" or "consequential" situations. Now, however, the concept of "consequential" damages has by this decision been carried across the line into the area of what have customarily been known as "severance" damages under sub-section (2) of Section 78-34-10.

* * * *

In its decision this Court made another statement which has done nothing to clarify the law in this state:

> " . . . the statute above set out gives a landowner whose land is taken in part the damages which will accrue to the land not taken by reason of its severance and by reason of the improvement in the manner proposed by the plaintiff. In this case it is neither the damage occasioned by the construction of the improvement nor the severance of the land which caused these defendants to feel aggrieved, but rather it is the failure to recover the damages occasioned by the noise of the traffic . . . "

Actually, Judge Norseth did in fact rule in his findings that the noise was *"due to the widening of the prevoiusly existing highway"* and the *" . . . closer proximity . . . "* of the travelled portion the new highway to the residence of the defendants; therefore, the previously quoted portion of the Court's opinion would seem to imply that only "construction" damages resulting during the time when the highway was being built would be recoverable. Such an approach would, of course, exclude damages resulting from the subsequent *"use"* of the highway facility.

If damages incurred during "construction" only can be considered, then we again find Utah in a very narrow position among the various state court decisions. As a practical matter, most courts severely limit the recovery for damages caused during the course of actual constructoin since the bulk of such damages are not a necessary and ordinary incident of the nature of the project. Such damages are usually the type which involve negligence on the part of a contractor. In short,

the area of recovery, under a construction which would limit the recoveries to damages actually caused by and during construction, is practically meaningless in its effect toward furnishing a property owner with just compensation.

The only logical and sensible approach to the provision of our statute allowing for recovery due to " . . . the construction of the improvement *in the manner proposed* . . . " is to give the phrase a reasonable interpretation. Thus, the various courts have held that the *"use"* to be made of the property being acquired is a proper element to be considered on the matter of "severance" damages to the remaining properties. Referring to Appellant's Brief filed in this matter the case of ***City of Crookston v. Erickson,*** 244 Minn. 321, 69 N.W. 2d 909, clearly sets forth (p. 14) the distinction between "severance" and "consequential" damage, and it also pointed out that there should be considered both the *"taking and use" . . . "to which the property taken will be devoted by the taker."* Further, in the case of *Department of Highways vs. Elizabethtown Amusements, Inc.,* 367 S.W. 2d 449 (Kentucky), the statement concerning use was again mentioned:

> "In any situation the use to which the condemned property will be put necessarily will have some bearing on the existence and extent of damage to the remaining land of the condemnee. A common example would be a reduction in value of residential property resulting from the highway's being brought in close proximity to the dwelling."

From 26 American Jurisprudence 2d, Eminent Domain, Sec. 160, page 830, the rule is further enunciated:

> "It is not necessary that damages shall be caused by trespass or an actual physical invasion of the real estate, but *if the construction and operation of the improvement are the cause of the damage*, although consequential, the party may recover."

Contrary to the interpretation given the *Oregon Short Line Railroad* case in this Court's opinion in this matter, the same section from American Jurisprudence states that—

> "Any definite physical injury to land *or an invasion of it cognizable to the senses*, depreciating its value, is a damage in the constitutional sense, regardless of whether it is such an injury as a neighboring owner might inflict without liability at common law."

The rule stated by this Court's opinion requires that any damage arising from the *use* of the acquired property in a partial taking case must be actionable at common law or affect the land physically. A similar rule can be found in numerous cases and in the writings of authorities on eminent domain; however, the rule has *never* been applied to partial taking cases. The requirement that the damage be actionable at common law or directly affect the land physically applies only to no-taking cases and has *never* been applied to partial-taking cases. The error in applying this rule to partial taking cases is pointed out in 2 Nichols on Eminent

Domain, Sec. 6.441 (2) where the rule is discussed in its application to no-taking cases and not in its application to partial taking cases. Nichols points out that damages actionable at common law are those actionable if done by an individual. Since an individual could not effect a partial taking, the rule has no application to partial taking cases. Any encroachment upon the land analogous to a complete partial taking was and is obviously compensable. The rule's application came in the no-taking cases where the injury originated or sprang from neighboring property. The loss of lateral support is an example of an injury actionable at common law. This Court should not create an anachronism by applying this rule to cases where it has historically not been applied and where it is totally unworkable.

Even in its application to no-taking cases, the rule's reference to damages actionable at common law has been criticized. In 2 Nichols on Eminent Domain, Sec. 6.441(2), the reference was said to " . . . *neither clarify the situation nor give the clause a broad enough meaning* . . . " Also, in the same section the test to determine whether an injury is actionable at common law was said to be " . . . *in most cases* [redacted] . . . "
Useless

A consideration of Subsection (4) of Section 78-34-10, concerning benefits, will point out the inconsistency in this Court's position. That subsection provides that benefits " . . . by the construction of the improvements proposed by the plaintiff . . . " can be set-off against damages to the remaining tract. It will be noted

that Subsection (4) refers to "construction" as do Subsections (2) and (3), and likewise contains no direct reference to "use".

Nevertheless, this Court and all courts allowing a set-off for benefits have allowed benefits arising from the *use* of the proposed improvement. In fact, it is difficult to conceive of a benefit which does not arise from the *use* of the proposed improvement. That benefits do arise from the use of *the* proposed improvement is attested to by 3 Nichols on Eminent Domain, Section 8.62, page 58:

> "In those jurisdictions where set-off is permitted, consideration may only be given to those benefits which are to accrue from the projected *use* on behalf of which the immediate condemnation is instituted. Benefits accruing from other improvements cannot be considered." (Emphasis added).

A listing of some benefits which have traditionally been allowed as set-off will point out the truth to appellant's contention that most benefits do arise from the intended *use*. In Section 8.6203 (3) of 3 Nichols on Eminent Domain, the following benefits are listed:

(a) " . . . newly acquired frontage . . . "

(b) " . . . improved access . . . "

(c) " . . . better accommodation of traffic . . . "

(d) " . . . passing of a greater number of people . . . "

From a careful consideration of the listed benefits it can be seen that a mere construction of an improvement will not give rise to the benefit. The benefit depends upon the proposed and anticipated use of the improvement.

The rule adopted by this Court creates a double standard—much to the advantage of the State Road Commission. The Court's rule allows benefits arising from *use* but eliminates all damages arising from *use*. Such a double standard is obviously not sanctioned by the effect of each upon the market value of the remaining land.

> " . . . The market value will reflect the possibility of harmful *use* as well as a beneficial one, and will discount the possibility that the public use may be discontinued altogether . . . " (Emphasis added).
>
> 3 Nichols on Eminent Domain, Section 8.6201, page 64.

Likewise, this Court held that damages arising from *use* of the proposed improvement be actionable at common law or affect the land physically. Again, this same requirement of direct physical affect is not reflected in the benefits allowed. A review of the listed traditional benefits will point this out. Nichols in his work on Eminent Domain emphasizes that benefits need not have a direct physical effect upon the remaining tract.

> "The market value ~~as~~ of a parcel of land may be increased by a public improvement which effects no physical change in the land itself . . . "

Further analysis of the above quoted statement from this Court's opinion, taken in view of the *Oregon Short Line Rail Road* case, clearly shows that that case actually considered elements of damage seemingly excluded by this opinion when it considered damages from *"jarring"*, or by the *"throwing of cinders or ashes"*. In short, such damages must of necessity arise from the "use" to which the property would ultimately be put.

* * * *

Further analysis of the opinion reveals another fatal defect when taken in light of the quote from *Board of Education v. Croft*, 13 Utah 2d 310, 373 P. 2d (1962). The portion of the quote which has significance is the following:

> "Damages to land, by the construction of a public or industrial improvement, through no part thereof is taken as provided for under 78-34-10 (3), *contrary to the rule for severance damages . . .*"

The statement referring to a different rule in "severance" damage situations seems to be the obstacle in this entire matter which required the arbitrary definition of when and at what point damages become "consequential", as set forth in the opinion. Further, it can hardly be imagined that Justice Wade, when he wrote the *Croft* opinion, ever had in mind the precise distinction between "severance" and "consequential" damages that is set forth in this decision. In fact, specific reference

is made to *no-taking situations* " . . . as provided for under 78-34-10 (3), *contrary to the rule for severance damages.*" The foregoing quote, taken from other authority, quite clearly separates the two types of damages as this writer is suggesting, and the opinion of this Court now sets up an arbitrary line distinguishing between "severance" and "consequential" damages, without basic supporting authority or reason.

The irony of the result in this case is that these defendants throughout their Brief contended that the case of ***Board of Education v. Croft*** was the prime authority supporting their own position, and the plaintiff in its Brief at page 11 merely referred to the quotation from the *Croft* case in this opinion as being *"dicta"* and " . . . *not sufficient to overrule the precedent and reasoning that has evolved since the enactment of the Utah State Constitution.*" It thus appears that both plaintiff and defendant felt that the quoted portion of the *Croft* case, contrary to the result reached by the Court in its opinion, *was dispositive of the case in favor of defendants!*

POINT II

EXCESSIVE NOISE IS A PROPER ELEMENT OF DAMAGE TO BE CONSIDERED IN A "TAKING" CASE UNDER SUBSECTION (2) OF SECTION 78-34-10.

Although the issue of the possible recovery of damages resulting from noise *per se* was not contested by either party to this litigation this Court's opinion is unusual in that it really decided the case on the basis that noise was a *non-compensable* element in assessing "severance" damages—as appellants would have it – or, for that matter, even in "consequential" damage situations. Thus, in no case in Utah can *noise* as such be considered in an eminent domain proceeding. A simple ruling, as indicated above, would have eliminated the necessity of classifying noise as a "consequential" damage in a taking case; however, the rule enunciated in the *Croft* case forced the arbitrary line adopted by this Court since it referred to a different rule in "severance" situations.

The irony of the decision is multiplied when it is considered that, here again, neither the plaintiff nor the defendant ever raised so much as a suggestion that noise was not compensable in at least some situations. An analysis of plaintiff's Brief and the argument made before this Court will fail to find the slightest suggestion that noise is never compensable. The only position taken by plaintiff was that, in a "severance" case involving an underlying taking, as well as in a "consequential" case, the noise must be special, unique and peculiar to the property affected in order to be considered. Nothing in plaintiff's position implies or suggests that noise is *never* a proper element supporting, among others, a recovery in eminent domain cases.

But the matter is not as simple as that of excluding noise in all condemnation cases, as this Court has ruled. Referring to the *Oregon Short Line Rail Road* case cited by this Court in its opinion, we find that the reference to noise in that case was tied to—

> "*Mere* noises, . . . the effect (of which) would be to or upon the *sensibilities of such persons,* and not to or upon the property as such."

Even if we accept the Court's cited reference as authority in Utah, the findings in this matter are not such as to classify the noise to the Williams' properties as being *"mere noises"*, which do not affect the value of the property. The specific finding of the Court was that the noises were so bad as to cause a diminution of $3,896.00 in the market value of the property. As such, the case cited by the Court in its opinion is not only a case which would only be applicable in "consequential" —or non-taking cases (as was the fact)—but it is otherwise factually not in point with the Williams' situation.

Further, it is submitted that all individuals in the use of their properties are entitled to reasonably quiet and peaceable possessions of their premises. When the noise factor becomes so great that it is impossible to sleep during the summer months because of heavy and noisy traffic, how can it be said that such noise is simply *"disagreeable"* or an *"annoyance"* merely affecting the *"sensibilities of such persons"*. Certainly, noise to this degree has a very definite adverse effect on the property, and, as a technical matter, is even a "physical"

trespass to the property itself in the form of loud and continuous sound waves.

A good number of airplane over-flight cases have been handed down in federal and state courts in recent years where noise has been the ingredient of damage. In some of the *cases* the noise has actually been considered to constitute an actual "taking" where the applicable state constitutional provision (or the Fifth Amendment to the U. S. Constitution) failed to include an *"or damaged"* provision similar to that contained in our Utah Constitution. The holdings in those non-taking cases have been predicated on the basis that the noise was such an invasion as to " . . . deprive(d) the property owners of the enjoyment and use of their properties," and the noise may come straight down from above, or from some other direction. Even in those cases requiring a trespass due to an over-flight of the land damaged (thereby effecting a technical legal taking) as in *Batten v. U.S.*, 306 F. 2d 580 (10th C.C.A.), the noise element can be considered where an actual technical taking occurs, although no constitutional *"or damaging"* provision is present.

To state that noise is never an element to be considered in either a "severance" or a "consequential" damage case, as the Court's opinion makes quite clear, is to disregard the facts of life and practically every legal opinion on the subject in this nation. One need only go to the matter of noise created by low flying planes — avigation problems — to find massive authority that

noise alone can be sufficient to permit recovery, particularly in cases involving takings. Similarly, the cases simply abound from all of the states providing that noise and similar proximity elements can be considered in the overall assessment of damages in taking situations. A few of many decisions are cited in Appellants' Brief: *Touchberry*—South Carolina (p. 12), Bourg and Leger –Louisiana (p. 21), ***Elizabeth Amusements, Inc.*** — Kentucky p. 21), ***Zaremba***—Kentucky (p. 22), ***Burns*** –Kentucky (p. 22), ***Methodist Church—Georgia*** (p. 23), ***Pierpont Inn, Inc.***—California (p. 23), and our own Utah case of ***State Road Commission v. Christensen*** (p. 22), 13 U. 2d 224, 371 P 2d 522 (1962).

There is another serious problem which is overlooked in the opinion—and that is the matter of segregating noise from other elements of damage. The Williams' case contained a somewhat unusual situation in that the amount of damage assignable to noise was determinable because the appraiser of the property owner used a "cost of cure" approach. Had this approach not been used, as will be the situation in probably 90% of all cases where noise is an element mixed in with other elements of damage, how could noise ever properly be separated from an appraisal? The problems are great in this respect, and a condemnation matter involving such elements of damage might often hinge on what appraiser and lawyer was best prepared as a technical matter. Just compensation should not be made to hinge on such technicalities.

On the general subject of attempting to segregate and place values upon different factors contributing to damage to remaining properties, the Appellate Division of the Supreme Court of New York (1967) in the case of *Dennison v. State,* 281 N.Y.S. 2d 257, pointed out that a consideration of noise as a factor contributing to damages was not separable from other concededly legitimate factors, and therefore, was not subject to a valuation by the Appellate Court. It also pointed out that the inter-relation of noise with elements such as vision and privacy would have made it impossible to attribute specific amount to noise. However, the issue was resolved since the court held noise was properly considered a factor of damage caused by the construction of a new highway.

CONCLUSION

With all due respect to the opinion handed down by this Court it can be said that the opinion seemingly reads well, but a close analysis of the opinion reveals serious defects of factual application and legal interpretation which can be summarized as follows:

1. The Court created an erroneous distinction between "severance" and "consequential" damages, and the quoted portion from the *Croft* case supports the rule and theory advanced by appellants in this case rather than that of the opposite position.

2. The apparent ruling of this Court to the effect that damages resulting from the intended "use" of a

project cannot be considered in the severance damage analysis is both unsound law and is contrary to the elements of damage which were actually considered in the *Oregon Short Line Railroad* case cited in the opinion.

3. As a factual matter the type of noise in the *Oregon Short Line Rail Road* case was not the degree of noise sustained by the Williams' properties as was reflected in a substantial diminution in the market value of the properties.

4. Noise has uniformly been recognized as an element affecting value of remaining properties in "severance or taking cases where it was of sufficient degree to affect market value.

* * * *

The opinion handed down in this matter should be substantially modified and the judgment resulting therefrom should be reversed in favor of appellants.

Respectfully submitted,

GLEN E. FULLER
Attorney for Appellants

15 East 4th South Street
Salt Lake City, Utah